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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JEANNETTE MARTELLO, Plaintiff and Appellant, v. CHARLES WILLIAM BUCK et al., Defendants and Respondents.	B285001 (Los Angeles County Super. Ct. No. BC515474)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Crawford Law Group and Daniel A. Crawford for Plaintiff and Appellant.

Tovar & Cohen, Rene Tovar, and David J. Cohen for Defendants and Respondents.

Plaintiff and appellant Jeannette Martello sued defendants and respondents Charles William Buck and Jae Buck[1] (collectively the Bucks) for defamation and assault after the Bucks expressed to Martello their dissatisfaction with Martello's billing practices for her services as an emergency surgeon treating an injury Charles Buck suffered. The Bucks filed a cross-complaint for malicious prosecution, claiming that Martello had pursued litigation to collect on her medical bills despite knowing that the bills were illegal. After months of negotiations, the parties appeared to have reached terms to settle their claims against one another. Martello later changed her mind and refused to enter the settlement agreement in court.

After a bifurcated court trial on whether they had entered into a settlement agreement, the trial court found that the parties had entered into a valid contract and dismissed the case pursuant to their agreement. We affirm.

FACTS AND PROCEEDINGS BELOW

In July 2013, Martello filed suit against the Bucks, alleging causes of action for defamation, assault, and intentional infliction of emotional distress. Martello, who is a doctor, claimed that after she had a legal dispute with the Bucks regarding a medical bill, the Bucks made false and disparaging statements about her on the internet. She also alleged that the Bucks confronted her at a bank, made disparaging statements about her, and pursued her after she left.

In October 2013, Jae filed a cross-complaint against Martello for malicious prosecution. In the cross-complaint, Jae alleged that Martello performed emergency surgery on Charles to reattach a severed finger, then billed Charles for the amount of her bill that Charles's insurance company did not pay. This

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[1] We refer to the Bucks by their first names in order to distinguish between them. No disrespect is intended.

practice is known as "balance billing" and is illegal in California. (See *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497, 506.) The cross-complaint alleged that the Department of Managed Health Care ordered Martello to cease and desist from balance billing her patients, but that Martello nevertheless sued the Bucks to collect the unpaid balance and obtained a default judgment against Jae. According to the cross-complaint, Martello attempted to collect the default judgment by forcing a sale of the Bucks' home. Jae managed to avoid the forced sale of the home by obtaining relief from the default judgment. According to the cross-complaint, an administrative law judge placed Martello's license to practice medicine on probation for five years because she continued to engage in balance billing after being ordered to stop. The cross-complaint contended that Martello acted with malice and without probable cause in filing and prosecuting the lawsuit to collect the unpaid balance from Charles's surgery.

The parties engaged in settlement negotiations at least as early as July 2014 and were close to an agreement by October 2014. In December 2014, Martello, who at the time was representing herself in the litigation, exchanged emails with the Bucks' attorney, David Cohen, regarding the details of the settlement agreement. In an email dated December 10, 2014, Cohen wrote that he had made the changes Martello requested, but that he was "running out of colors" to denote different levels of revisions "so is it now acceptable to you? If so, I'll encourage the Bucks to agree so we can get this done." Six minutes later, Martello replied, "Am good to go David with it." Cohen responded that he would "have the Bucks review and let you know if we're done as soon as I know. Hopefully you'll be available if they want some last minute tweaks." The two then discussed the mechanics of the filing to dismiss the case and exchanging signatures.

Cohen emailed the Bucks shortly thereafter, informing them that "Martello finally approved the attached settlement agreement" and asking them to "review and let me know if you're okay with it." According to Cohen, the Bucks called him later the same day and told him "that they had read the settlement agreement that [Cohen] had sent them that Dr. Martello had accepted, and they said that it was fine, they were fine with it, they wanted to end this." Cohen testified that he called Martello immediately afterward and "told her that we had a settlement, that the Bucks had accepted the agreement." At a hearing two days later, on December 12, 2014 the parties jointly represented to the court that they had reached a settlement but needed time to work out some paperwork.

The December 10 settlement document called for Charles to "provide a written statement to Martello that: (a) he was satisfied with the medical services Martello rendered to [him] in 2010; and (b) he was mistaken about the amount Martello sued the Bucks for when he posted on the internet that she had sued them for $25,000." (Boldface omitted.) The document also required the Bucks to "send a written request, with truthful and accurate language mutually acceptable to the Bucks and Martello, requesting that Anthem [Blue Cross, the Bucks' insurer] pay Martello's bill for services she rendered to [Charles] in 2010." (Boldface omitted.)

In February 2015, Martello and Cohen exchanged proposals for a letter the Bucks could send to Anthem Blue Cross asking the insurer to pay Martello's outstanding bills. On February 23, the Bucks agreed to the language in Martello's most recent proposed version of the letter. Charles also provided a letter stating that he was satisfied with the medical care Martello provided and that he was incorrect about the amount of money for which she had sued them.

According to Cohen, Martello informed him in March 2015 that she wished to renegotiate the statement from Charles that

he was satisfied with the medical care he received. Martello filed a motion to stay proceedings in the case and sent Cohen an email that led him to believe she did not believe the case was settled and wished to proceed to trial. The Bucks filed a motion to enforce the settlement agreement, and the parties jointly moved to sever the settlement issue from the remainder of the case.

After a bench trial on the issue of the settlement, the trial court found that the parties entered into a settlement agreement as of December 10, 2014. The court also found that the Bucks were entitled to $83,340.22 in attorney fees under the terms of the settlement agreement, and entered judgment in favor of the Bucks.

DISCUSSION

I. Jurisdiction to Enforce the Settlement Agreement Under Code of Civil Procedure Section 664.6

Martello contends that the trial court lacked jurisdiction to enforce the settlement agreement because the agreement did not comply with Code of Civil Procedure section 664.6 (section 664.6). We disagree. The court held a trial on the issue of whether the parties had settled the dispute, not a proceeding to enforce an agreement under section 664.6.

Section 664.6 provides that "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." Martello is correct that the settlement agreement in this case did not conform with the requirements of section 664.6 in that it was not a signed writing and was not entered into orally before the court. It does not follow, however, that the agreement was therefore invalid or that the trial court lacked jurisdiction over it.

The procedure established by section 664.6 "is not exclusive. It is merely an expeditious, valid alternative statutorily created. . . . Settlement agreements not enforceable under . . . section 664.6 are governed by the legal principles applicable to contracts in general." (*Nicholson v. Barab* (1991) 233 Cal.App.3d 1671, 1681.) Because there was no signed settlement agreement, the trial court could not and did not simply enter judgment on the settlement pursuant to section 664.6. Instead, the court held a trial to determine whether a valid settlement agreement existed, a necessary precursor to enforcing the agreement by dismissing the case.

II. Ripeness of the Settlement Decision

Martello contends that the question of the validity of the settlement agreement was not ripe because the Bucks did not plead an affirmative defense of settlement, and that the court therefore improperly issued an advisory opinion. We disagree.

First, if there was any error in trying the issue of settlement in the absence of a proper pleading by the Bucks, Martello invited the error and waived any objection to it. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [" 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal"].) The trial court held a separate trial on the issue of settlement because both parties expressly requested severance and neither requested a jury trial on the issue. In a motion filed April 8, 2016, Martello joined the Bucks in asking "that the trial be continued for a period of 60 to 90 days, and that the issue of an alleged prior settlement be severed and tried separately."

Next, even assuming that Martello is correct that the Bucks should have amended their pleadings to include settlement as a defense, this was not a prejudicial error. Martello "was at all material times fully apprised that the question of [settlement] was placed in issue" (*Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 109), and she does not now claim otherwise.

Finally, Martello contends that the question of settlement was not ripe because it was a "hypothetical situation" or "contrived inquiry." We disagree. There was an active dispute as to whether or not the parties had reached a valid settlement and the court trial resolved that dispute in the affirmative.

III. The Trial Court's Finding of a Settlement Agreement

Martello contends that the trial court erred in finding that the parties entered into a final settlement agreement on December 10, 2014. The determination of whether the parties had agreed to the terms of a contract "raised a factual issue, not an issue of contract interpretation," and we therefore review for substantial evidence. (*City of Glendale v. Marcus Cable Associates, LLC* (2014) 231 Cal.App.4th 1359, 1385.) Alternatively, Martello contends that the actual terms of the settlement agreement required the parties to sign before it would be binding. This is an argument regarding the interpretation of a contract, and our review is de novo. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 520.) We are not persuaded by Martello's contentions.

"A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810.) Thus, a settlement agreement requires mutual assent or consent between the parties, and " '[t]he existence of mutual consent is determined by objective

rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe.' " (*Id.* at p. 811.)

In this case, the trial court determined that the parties expressed a mutual intent to form a contract on December 10, 2014, and that the settlement agreement became effective on that date. There was substantial evidence to support the trial court's findings. In the context of the multiple emails between Cohen and Martello negotiating the terms of the agreement, the trial court could reasonably interpret Martello's statement, "[a]m good to go David with it," in response to Cohen's question "is [the agreement] now acceptable to you?" as Martello's assent to be bound to the terms of the agreement as written. The court could also reasonably credit Cohen's testimony that he told his clients about Martello's acceptance, that they assented the same night, and that Cohen relayed the Bucks' assent to Martello. In reaching these conclusions, the trial court could reasonably choose not to credit Martello's claim that when she wrote, "[a]m good to go David with it," she meant she was ready for Cohen to show the contract to the Bucks, not that she agreed to the terms of the agreement. The court could also reasonably conclude that Martello's memory failed her in her inability to recollect that Cohen called her to tell her that the Bucks agreed to the contract.

Nevertheless, Martello contends that the settlement agreement was not effective until it was actually signed by the parties, but it was never signed. Martello's argument misconstrues the terms of the contract. She is correct that the agreement required the parties to sign it, but this was an obligation of the parties under the contract, not a required step before it became binding. The agreement stated that "upon the mutual covenants and conditions herein, and upon all conditions precedent being satisfied, the following shall occur." The contract then listed nine actions for the parties to perform, the first of which was as follows: "An authorized representative of each

party shall promptly execute this agreement, and shall promptly deliver to the other parties (or where applicable their legal counsel) a partially-executed copy of this agreement." In other words, signing and delivering a signed copy of the agreement was not a condition precedent to the contract becoming effective, but rather was an obligation the parties were required to perform once any conditions precedent were satisfied and the contract was effective.

To the extent extrinsic evidence of the parties' conduct after December 10 is at all relevant, it demonstrates that the parties believed the contract was already effective. Thus, the parties told the court at the December 12 hearing that they had reached a settlement but needed time to work out some paperwork. The parties also discussed when they could sign the agreement, as they were obligated to do. In addition, as required by the contract, Cohen sent Martello a copy of a statement by Charles stating that Charles was satisfied with the treatment he received and was mistaken about the amount Martello had sued him for. And Cohen and Martello negotiated the terms of a written letter for the Bucks to send to Anthem Blue Cross. The settlement agreement required the Bucks to send such a letter "with truthful and accurate language mutually acceptable to the Bucks and Martello." (Boldface omitted.)

IV. Application of the Statute of Frauds

Martello contends that the settlement agreement was not valid under the statute of frauds because it was not signed by the parties. (Civ. Code, § 1624.) This argument is meritless.

The statute of frauds provides that a contract "for the sale of real property, or of an interest therein" (Civ. Code, § 1624, subd. (a)(3)) is invalid unless it is "in writing and subscribed by the party to be charged or by the party's agent." (Civ. Code, § 1624, subd. (a).) Martello contends that the settlement agreement involved the judgment lien she obtained on the Bucks'

home. Because a judgment lien is an interest in real property, she contends that the statute of frauds renders the settlement agreement invalid without a signature. This is incorrect: "[A]n oral agreement providing for the discharge of an obligation to pay money secured by an interest in real property is not within the real property provision of the statute of frauds." (*Bernkrant v. Fowler* (1961) 55 Cal.2d 588, 593.) But even if Martello were right that a settlement dealing with a judgment lien is covered by the statute of frauds, in this case the Bucks have submitted documents to us, of which we have granted judicial notice, showing that the judgment lien was no longer valid.

In her reply brief, Martello contends for the first time that the statute of frauds also applies because the contract could not be "performed during the lifetime of the promisor." (Civ. Code, § 1624, subd. (a)(5).) She cites language from the settlement agreement stating that it "shall inure to the benefit of and be binding on the parties' heirs." She also contends for the first time in her reply brief that the contract violates the equal dignities rule, a corollary of the statute of frauds. The equal dignities rule provides that when a contract is required to be in writing, authority to enter into a contract must itself be in writing. (See Civ. Code, § 2309.) Martello forfeited these arguments by failing to raise them in her opening brief on appeal. In any case, the rule has no application in this case.

V. Admission of Settlement Communications

Martello contends that the trial court abused its discretion by admitting into evidence the parties' confidential settlement communications. We are not persuaded. Under Evidence Code section 1152, "[e]vidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct

or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."

The plain language of the statute indicates that it bars the admission of evidence of an offer to compensate someone for a loss or damage only for the purpose of "prov[ing] his or her liability for the loss or damage or any part of it." (Evid. Code, § 1152.) The statute "has not generally been regarded as creating a class of privileged communication," and evidence of settlement communications is admissible for other purposes. (*Fieldson Associates, Inc. v. Whitecliff Laboratories, Inc.* (1969) 276 Cal.App.2d 770, 773.) Thus, in *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 296–297, the court upheld the admission of letters of compromise negotiations between parties in order to determine whether the parties had reached a binding agreement of a different dispute. In this case, the evidence of settlement negotiations were introduced only to show whether a binding agreement existed, not to prove any party's liability for loss or damage.

VI. Attorney Fees

Martello contends that the trial court erred by awarding attorney fees in favor of the Bucks for enforcement of the agreement. We disagree. The agreement provides that "[s]hould any legal action, arbitration and/or other proceeding be brought for the enforcement of this agreement, or because of an alleged breach, default, dispute or misrepresentation in connection with any of the provisions of this agreement, the prevailing party shall be entitled to recover all his/her/its reasonable attorney's fees and legal costs incurred in that action or proceeding." Martello claims that this provision does not apply because the trial was not an effort to enforce the settlement agreement, but rather to establish whether there was a settlement agreement. This misrepresents the nature of the dispute. The purpose of determining whether the settlement agreement was valid was

to determine whether it could be enforced against Martello, and the immediate consequence of the trial was enforcement of the contract and dismissal of the case.

Martello also contends for the first time in her reply brief that the award of attorney fees was improper because attorney fees under Civil Code section 1717 are available only when contracts are signed. Martello forfeited this argument by failing to raise it before her reply brief. In addition, she is mistaken that special rules regarding signature requirements apply to contractual provisions for attorney fees. (See *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 752.)

VII. Inconsistencies in Minute Orders

Martello contends that the trial court erred because its findings at trial contradicted its own minute orders. On October 9, 2014, the court entered a minute order reading, "Counsel for defendant/cross-complainant represent to the court the parties have reached a settlement in principle on the cross-complaint." In its statement of decision, the court stated, "At the final status conference held on October 9, 2014, the parties represented that they had reached a settlement agreement in princip[le]." Martello suggests that the statement of decision contradicts the minute order because the minute order indicates that the settlement in question was limited to the cross-complaint only.

In a minute order dated December 12, 2014, the court stated that the "[p]arties request[ed] additional time to finalize terms of settlement." Martello argues that this minute order conflicts with the court's description of the December 12 hearing in the statement of decision: that the parties "appeared before the court on December 12, 2014, and jointly informed the court that the matter had settled."

We disagree that the minute orders show that the court erred in its statement of decision. All evidence suggests that the

court made a clerical error in describing the proposed settlement in October 2014 as pertaining to the cross-complaint alone. The testimony at trial and the parties' email correspondence demonstrate that the parties were negotiating in October 2014 to settle the entire case, not merely the cross-complaint. In a filing on a summary judgment motion before the trial court, Martello accepted as undisputed the following characterization of the December 12 hearing: "Martello and Mr. Cohen jointly represented to the [c]ourt that the parties had reached a settlement, but needed some additional time to finalize documents incidental to the Settlement Agreement." The other evidence in the record supports this description as well.

In any case, the minute orders do not contradict the statement of decision. The October 9 minute order states that the parties had reached a settlement in principle on the cross-complaint. This does not exclude that the parties had also agreed to a settlement on the complaint. Likewise, when the court stated in the December 12 minute order that the parties requested additional time to finalize the terms of the settlement, the court may simply have been referring to the parties' need to sign the documents and file the paperwork necessary to dismiss the case. It does not necessarily imply that the parties had not agreed to the settlement.

VIII. Validity of Section 1542 Waiver

Martello contends that the settlement agreement is invalid because it contained a provision waiving claims unknown at the time of the waiver. According to Martello, Civil Code section 1542 requires all such waivers to be signed. Martello forfeited this claim by failing to raise it before the trial court.

IX. Parol Evidence Rule

For the first time in her reply brief on appeal, Martello contends that the trial court erred by admitting extrinsic

evidence of the terms of the contract in violation of the parol evidence rule. Martello forfeited this argument by failing to raise it in the trial court and in her opening brief on appeal, and the argument also fails on the merits.

In her reply brief, Martello claims that the Bucks "introduced" the parol evidence rule in their respondents' brief and implies that therefore she may counter the argument in her reply brief. This is incorrect. In the course of their brief, the Bucks cited a handful of cases that deal with the parol evidence rule, but made no argument regarding the application of that rule themselves. In her reply brief on this subject, Martello does not respond to the Bucks' argument, but instead raises an entirely new argument for challenging the settlement agreement. This she may not do. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894-895, fn. 10 [" ' "Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." ' "].) Martello also claims that she objected to the evidence at trial. In fact, she objected only on the ground that the evidence was inadmissible as settlement negotiations. A challenge to the admissibility of evidence is not preserved for appellate review when the particular ground for exclusion asserted on appeal was not asserted in the trial court. (*People v. Bolden* (2002) 29 Cal.4th 515, 546–547.)

Moreover, the trial court did not admit evidence in violation of the parol evidence rule. "The parol evidence rule generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument." (*Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1433.) The evidence of the parties' settlement negotiations in this case was not introduced to alter the terms of the parties' written agreement, but rather to establish whether a valid contract existed.

DISPOSITION

The judgment of the trial court is affirmed. Respondents are awarded their costs on appeal. Respondents' motion to dismiss the appeal for failure to file a timely brief is denied as moot.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.